

6. Basic Legal Concepts

this restriction on the federal government; the fourteenth makes it applicable to states and local governments. These clauses cover not only legislative acts but also those of administrative agencies, sanitary districts, public schools, and all other governmental units. They cover not only the official acts of the agency itself but also the job-related actions of government employees. For example, the actions of an individual policeman are considered to be the actions of the government itself as long as that policeman was acting as a policeman.

The first question that must be answered in a due process analysis is whether the clause applies to the situation in question: Is the government seeking to deprive a person of "life, liberty, or property"? It is clearly a violation of one's liberty to be placed in jail, but is it also a violation to be denied the opportunity to publish a newspaper or to bus children across town rather than allow them to attend a neighborhood school? Is it a deprivation of property when a court garnishes a person's wages because that person owes someone money? Is the welfare department's action in reducing a person's level of benefits a denial of a property right? Each of these questions must be answered by the courts on a case-by-case basis.

After determining that the due process clause does apply, the courts then decide what the government must do to meet the standards of fairness and reasonableness. Here again the answer varies according to the situation. **Procedural due process** focuses on the method used to determine whether the deprivation should take place. **Substantive due process** focuses on the government's right to make the deprivation rather than the way in which it takes place.

The paralegal is most likely to be involved in controversies over the applicability of various due process procedures. In the administrative context, there is much variation in procedures at hearings and even in the decision to hold a hearing.

Table 6.1 lists the elements associated with procedural due process. The paralegal must become familiar with all of them. With the exception of 6.c all have been held to be applicable to felony trials. In other types of trials, however, the government may legitimately decide not to include certain elements. The Supreme Court, for example, has ruled that juvenile proceedings need not entail the right to a trial by a jury.⁵⁵

Some administrative hearings must include adequate notice, personal appearance, representation by retained counsel (or representation by nonlawyer or self), right to present witnesses, confrontation and cross-examination, an impartial decisionmaker, a decision based on evidence at the hearings, and a statement of the reasons for the decision.⁵⁶ On the

F. Constitutional Law

Elements of Procedural Due Process

1. Adequate notice
 - a. Sufficiently clear to be able to understand the nature of the complaint;
 - b. Received long enough in advance of hearing to adequate time for preparation.
2. Speedy justice
 - a. Trial or hearing held without undue delay.
3. Discovery
 - a. Right to see prior to the start of the trial or the physical and documentary evidence to be presented by the other side;
 - b. Right to be informed of the identity of the witnesses to be used by the other side;
 - c. Right to take depositions and/or interrogator witnesses;
 - d. Right to subpoena relevant information prior start of the hearing or trial.
4. Opportunity to be heard
 - a. Right to appear in person;
 - b. Right to present arguments;
 - c. Right to present physical and documentary evidence;
 - d. Right to have witnesses testify.
5. Compulsory process
 - a. Right to require persons to come forth with evidence or to testify.
6. Representation
 - a. Right to retained counsel (lawyer can speak for client's behalf);
 - b. Right to appointed counsel (lawyer paid for by government when the person cannot obtain his or her own);
 - c. Right to nonattorney representative (paralegal or other nonlawyer can speak for participant);
 - d. Self-representation (right to serve as one's own self).
7. Confrontation
 - a. Participant has the right to be present when evidence is presented.

55. McKiever v. Pennsylvania, 403 U.S. 528 (1971).

56. Goldberg v. Kelly, 397 U.S. 254 (1970).